

Aventure Communication Technology, LLC

IXCs Cannot Lawfully Withhold Payment  
For Tariffed Services

Presentation to Wireline Competition Bureau  
and Pricing Policy Division  
Federal Communications Commission

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# **The FCC's Access Regulatory Regime Requires Payment of Tariffed Rates**

- **In 2001, the FCC reacted to nationwide disputes and litigation between IXCs and CLECs over access charges.**
- **The Commission was concerned about abuses on both sides:**
  - For CLECs, lack of regulation was being used to set access charges at unreasonable levels.
  - For IXCs, self-help refusals to pay access charges became commonplace.

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# **IXCS CANNOT LAWFULLY WITHHOLD PAYMENT FOR TARIFFED SERVICES**

## FCC Access Regulatory Regime (cont'd)

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- **“Reacting to what they perceive as excessive rate levels, the major IXC’s have begun to try to force CLECs to reduce their rates. The IXC’s primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXC’s appear routinely to be flouting their obligations under the tariff system. Additionally, the IXC’s attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.”**
  - *Access Charge Reform, Seventh Report and Order*, 16 FCC Rcd 9923, 9932 ¶ 23 (2001) (7<sup>th</sup> R&O) (citations omitted).

# FCC Access Regulatory Regime (cont'd)

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## ➤ The Commission's solution – Regulate CLEC rates and rely on the tariffs to compel payment:

- The Commission regulated CLEC access charges, requiring that they be set no higher than the ILEC rate in the area they served.
- Once set at these levels, the regulated CLEC access charges were “conclusively deemed reasonable.”
  - 7<sup>th</sup> R&O, 16 FCC Rcd at 9948 ¶ 60.
- “Accordingly, an IXC that refused payment of tariffed rates within the [regulated level] would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate.”
  - 7<sup>th</sup> R&O, 16 FCC Rcd at 9948 ¶ 60.

## **FCC Access Regulatory Regime** (cont'd)

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- **The Commission believed this new regulatory regime would eliminate the widespread litigation.**
- **With CLEC access charges conclusively deemed reasonable and tariffed, the Commission believed it could rely on well-established precedent to shut down self-help:**
  - The Filed Rate Doctrine
  - The Constructive Ordering Doctrine
  - The “Pay and Complain” Rule
  - Express findings that self-help refusals to pay violate the Communications Act

# The Filed Rate Doctrine

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- **Carriers subject to self-help refusals to pay access charges routinely file collection actions in federal district courts, and rely on the Filed Rate Doctrine to compel payment.**
- **The Filed Rate Doctrine establishes that a validly filed tariff has the force of law, and that the tariffed rates cannot be challenged in a court of law, but are only subject to review by the appropriate regulatory agency.**
  - *Maislin Indus. Inc., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990); *Telecom Int'l. Am., Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 216-17 (S.D.N.Y. 1999); *MCI Telecomms. Corp. v. Dominican Commc'ns. Corp.*, 984 F. Supp. 185, 189 (S.D.N.Y. 1997).

# **The Constructive Ordering Doctrine**

- **The “Constructive Ordering Doctrine” applies in cases where the Filed Rate Doctrine is not invoked, and provides that a non-paying party effectively “orders” a carrier’s service, even if it has not complied with specific ordering provisions in a tariff, when the receiver of services:**
  - 1) is interconnected in such a manner that it can expect to receive service,
  - 2) fails to take reasonable steps to prevent receipt of service, and
  - 3) does in fact receive the service.
- **Under these circumstances, payment is compelled.**

– *Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000).



# The “Pay and Complain” Rule

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- **“The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tariffed charges and regulations.”**
  - *Bus. WATS, Inc., v. A.T.&T. Co.*, 7 FCC Rcd 7942 ¶ 2 (1992), citing *MCI Telecomms. Corp., Am. Tel. and Tel. Co. and the Pac. Tel. and Tel. Co.*, 62 FCC 2d 703 ¶ 6 (1976). See also, *Nat’l. Commc’ns. Ass’n., Inc. v. A.T.& T. Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001), citing both cases.

## **The “Pay and Complain” Rule (cont’d)**

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- **“[T]he Commission has recognized that ‘the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties . . . . Customers who claim that tariff rates are unreasonable may file complaints with the Commission under Section 208 of the Communications Act, but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable.’”**
  - *Communique Telecomms., Inc. DBA Logically*, 10 FCC Rcd 10399, 10405 ¶ 36 (1995) (citing the *Tel-Central* and *Bus. WATS* decisions).

## **The “Pay and Complain” Rule (cont’d)**

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- **“The Bureau rejected Frontier’s argument that a ‘dispute’ as to a carrier’s eligibility to receive compensation negates the IXC’s obligation to pay compensation in the first instance. The Bureau stated that an IXC disputing the veracity of a LEC’s certification must do so by initiating a proceeding at the Commission, e.g., through a Section 208 complaint against the LEC. We agree with the Bureau...”**
  - *Bell Atlantic-Delaware v. Frontier Commc’ns. Serv., Inc.*, 15 FCC Rcd 7475, 7479-80 ¶ 9 (2000).
  
- **“[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...”**
  - *Tel-Central of Jefferson City, Miss., Inc. v. United Tel. Co. of Miss., Inc.*, 4 FCC Rcd 8338, 8339 ¶ 9 (1989). See also *Communique Telecomms., Inc. DBA Logically*, 10 FCC Rcd 10399, 10405 ¶ 36 (1995).

## **Withholding Access Charges Violates § 201(b) of the Communications Act**

- **§ 201(b) prohibits “unreasonable practices.”**
- **The FCC and the courts have repeatedly found that refusing to pay access charges violates § 201(b):**
  - *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007).
  - *MGC Commc'ns., Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).
  - *Tel-Central of Jefferson City, Miss., Inc., v. United Tel. Co. of Miss., Inc.* 4 FCC Rcd 8338 (1989).

## **Withholding Access Charges Violates § 203(c) of the Communications Act**

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- **§ 203(c): “No carrier shall . . . charge, demand, collect or receive” rates different from its tariffed rates.**
- **FCC found MCI’s withholding payment of access charges violated § 203(c) because MCI received service without paying the tariffed rate.**
  - *MCI Telecomms. Corp., Am. Tel. and Tel. Co. and the Pac. Tel. and Tel. Co.*, 62 FCC 2d 703 ¶6 (1976).

## State Public Service Commissions Have Similarly Found that Access Self-Help Is Patently Unlawful

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### ➤ The Iowa Utilities Board found AT&T broke the law by withholding access payments:

- "... AT&T must pay the tariffed terminating access charges, even if the user's chosen LEC has terminating access charges that are higher than AT&T might like. Similarly, calls originating from customers of the complainant CLECs must be carried by AT&T, so long as AT&T serves any LEC in the exchange, and AT&T must pay the tariffed originating access charges."
  - *Iowa Utils. Board: Fibercomm, L.C., et al. v. AT&T Commc'ns. of the Midwest, Inc.*, Docket No. FCU-00-3, Final Decision and Order at 11-12 (Oct. 25, 2001).

## **State Public Service Commissions** (cont'd)

- **The Public Utility Commission of Texas found that AT&T could not refuse to pay tariffed CLEC access charges, and could not refuse to accept traffic from the CLEC.**
  - “In this case, the Commission decides that AT&T is legally obligated to pay for the switched access services it used since the initiation of XT&T’s local exchange service.”
    - *Public Util. Comm’n. of Tex., Complaint of XIT Telecomms. and Tech., Inc. v. AT&T Corp.*, P.U.C. Docket No. 22385; SOAH Docket No. 473-00-2224 (June 1, 2001).